IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAVON MARSHALL, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ESPN, INC., et al., Defendants.	Civil Action No. 3:14-cv-01945 Chief District Judge Kevin H. Sharp

REPLY MEMORANDUM OF LAW
IN SUPPORT OF LICENSING DEFENDANTS'
MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

STATUTE

INTRODUCTION

The brevity of Plaintiffs' response to the Licensing Defendants'[1] Motion to Dismiss ("LD Opp.") in fact speaks volumes. In just two pages, Plaintiffs repudiate the only purported restraint of trade that is alleged in the Complaint (the NCAA's amateurism rules) and confirm that they are unable to articulate any factual or legal basis to maintain antitrust claims against the Licensing Defendants.

In the Complaint, Plaintiffs directly attacked the NCAA amateurism rules, describing them at length as "anticompetitive agreements." Compl. ¶¶ 97-104. They characterized the amateurism rules, under which student athletes agreed not to accept payment for their participation in college sports, as the "linchpin" of all the defendants' unlawful conduct. *Id.* ¶ 7; *accord id.* ¶ 144. Plaintiffs alleged the amateurism rules "are inherently anticompetitive because they forbid Student Athletes from competing in the marketplace for the value of their services on and off the playing field." *Id.* ¶ 100.

Plaintiffs further alleged that the Licensing Defendants and anyone else who fails to pay student athletes for the value of their supposed rights of publicity in college sports broadcasts are co-conspirators with the NCAA in a grand antitrust conspiracy. *See* Compl., Introduction. For example, Plaintiffs claimed that, by entering into unspecified "multimedia licensing agreements," *id.* ¶ 120, with NCAA member schools that do not result in payment to student athletes, the Licensing Defendants have "adopted and implemented the restrictive rules and by-laws of the NCAA and Conference Defendants." *Id.* ¶ 9; *see also id.* ¶¶ 110-112, 120-123.

[1] As categorized in Plaintiffs' Complaint, the Licensing Defendants are Outfront Media Sports, Inc. (f/k/a CBS Collegiate Sports Properties, Inc.); IMG Worldwide, LLC; IMG College, LLC; William Morris Endeavor Entertainment, LLC; JMI Sports LLC; Learfield Sports LLC; T3 Media, Inc.; and TeleSouth Communications, Inc.

Beyond that, the Complaint failed to identify *any* alleged conduct by the Licensing Defendants that unreasonably restrains trade or causes antitrust injury to Plaintiffs.

As the Licensing Defendants demonstrated in their Motion to Dismiss, and now as implicitly acknowledged by Plaintiffs in their opposition, the problem with these allegations is that they fail as a matter of law in the face of explicit rulings by the U.S. Supreme Court, the Sixth Circuit, and the Middle District of Tennessee that conclusively establish that the NCAA's amateur eligibility rules are procompetitive and cannot support a claim under the Sherman Act. *See NCAA v. Bd. of Regents of Univ. of Okla*., 468 U.S. 85, 101-02, 117, 120 (1984); *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008); *Gaines v. NCAA*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990). The Supreme Court recognized in *Board of Regents* that to preserve the character and quality of the unique "product" in question – namely, amateur college football – "[student] athletes must not be paid." 468 U.S. at 102.

Plaintiffs do not make any serious attempt to rebut this argument, nor could they. Instead, in their opposition to the Licensing Defendants' motion, Plaintiffs abandon their previous course and claim that the NCAA amateurism rules "are not the restraint at issue." LD Opp. at 1. By solving one fatal problem Plaintiffs merely embrace another fatal one. No other anticompetitive restraint against the Licensing Defendants is pled.

Plaintiffs now assert that, as to the Licensing Defendants, the restraints at issue supposedly are unspecified broadcast contracts and multimedia agreements that "purport to transfer the right to use the NIL [names, images and likenesses] of Student Athletes." *Id.* They fail, however, to explain, much less plead, how these vertical agreements by themselves could possibly restrain competition or cause Plaintiffs to suffer antitrust injury. Now that Plaintiffs have abandoned the allegations in their Complaint, they are left with nothing as to the Licensing

Defendants. Plaintiffs' right of publicity, Lanham Act, and other claims must also be dismissed, for the reasons set forth in detail in the moving and reply papers of the Network Defendants and Conference Defendants. The Licensing Defendants join in those arguments and submit that the Complaint should be dismissed against the Licensing Defendants for the same reasons advanced by the Network Defendants and the Conference Defendants. *See* Fed. R. Civ. P. 10(c).

ARGUMENT

I. Plaintiffs Effectively Concede That Their Antitrust Claims Are Foreclosed By The U.S. Supreme Court's Decision in *NCAA v. Board of Regents*.

In *Board of Regents*, the Supreme Court found that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports," and that the NCAA's amateurism rules – including the imperative that such "athletes must not be paid" – "enable[] a product to be marketed which might otherwise be unavailable." *See* 468 U.S. at 120, 102. This is the hallmark of competition.

Plaintiffs wishfully try to sweep away the Court's analysis as nonbinding dicta, but the opinion makes clear that this reasoning was an essential step in the Court's consideration of the particular restraint at issue, a limitation on how many college football games could be televised. Thus, subsequent courts have held that *Board of Regents* established a category of NCAA rules – namely, eligibility rules that preserve the amateur character of the student-athlete – that are presumptively procompetitive. *See Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012). As the Seventh Circuit explained, "eligibility rule[s] aimed at preserving the existence of amateurism and the student-athlete" can be found to be procompetitive "'in the twinkling of an eye' . . . that is, at the motion-to-dismiss stage." *Id.* at 341 (citation omitted).

Plaintiffs similarly make a feeble attempt (LD Opp. at 2) to distinguish the cases cited by the Licensing Defendants and other defendants, applying *Board of Regents* to the particular rules

or regulations at issue in those cases. This nitpicking ignores the holdings and reasoning of those decisions, all of which consistently have found that eligibility rules that "fit into the same mold" as the amateurism rules discussed in *Board of Regents* are procompetitive and cannot support a Sherman Act claim as a matter of law. *E.g.*, *Agnew*, 683 F.3d at 341 (rules of the type "that have been blessed by the Supreme Court" in *Board of Regents* are "presumptively precompetitive"); *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (concluding at pleading stage that NCAA amateurism rules were reasonable and procompetitive and upholding dismissal of Sherman Act claim); *United States v. Walters*, 711 F. Supp. 1435, 1441-42 (N.D. Ill. 1989) (rejecting argument that NCAA eligibility rules that restrict compensation to student athletes constitute "illegal price-fixing").

In particular, following *Board of Regents*, the Sixth Circuit expressly held – at the pleading stage – that the NCAA amateurism rules did not violate the Sherman Act. *See Bassett*, 528 F.3d at 433. Likewise, in *Gaines* this District held that there is a "clear difference" between the television broadcast restrictions struck down in *Board of Regents* and amateurism rules that reflect the "NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football." 746 F. Supp. at 743. Thus, every level of the federal judiciary that binds this Court has concluded that the NCAA's amateurism rules do not violate the antitrust laws no matter what or who causes a student athlete to lose his amateur status. *See* discussion in Reply Brief of Conference Defendants § II.B(1).

Finally, contrary to Plaintiffs' suggestion, the Licensing Defendants did not make any "concession" (LD Opp. at 2) that *Board of Regents* only applies to "noncommercial" restraints. The Licensing Defendants instead pointed out the clear rulings by the Sixth Circuit and this

District that NCAA eligibility rules that preserve the amateur character of the college athletics are noncommercial rules beyond the reach of the antitrust laws. *See Bassett*, 528 F.3d at 433; *Gaines*, 746 F. Supp. at 743-44.

But even if the amateurism rules are characterized as commercial, *Board of Regents* makes clear that the rules are necessary to create the product – i.e., amateur college sports – and allow that product's survival in the face of commercializing pressures. *See Board of Regents*, 468 U.S. at 101, 117; *see also Agnew*, 683 F.3d at 339-41 (assuming amateur eligibility rules are commercial but finding them "clearly" procompetitive, per the "presumption" articulated in *Board of Regents*); *Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998) (even if eligibility rules were commercial and subject to the Sherman Act, they would be upheld as procompetitive as a matter of law at the pleading stage) *vacated on other grounds*, 525 U.S. 459 (1999); *McCormack*, 845 F.2d at 1343-44 (assuming "no draft" and "no agent" amateurism rules are commercial, and applying *Board of Regents* to affirm dismissal at pleading stage of Sherman Act claim based on sanctions against SMU for violating those rules).

Recognizing that the antitrust claims pled in the Complaint are foreclosed by *Board of Regents*, *Bassett*, *Agnew*, *Smith*, *McCormack*, and *Gaines*, Plaintiffs now abandon these allegations in their opposition papers. Instead they gesture vaguely at unspecified "vertical" agreements between NCAA member schools and the Licensing Defendants that fail equally as a matter of settled law.

II. Plaintiffs Fail To Allege Any Cognizable Restraint Against The Licensing Defendants.

Having abandoned the attack on the NCAA eligibility rules in their opposition, Plaintiffs fail to point to any allegation of the terms of any agreement or any other conduct by any of the Licensing Defendants that operates to restrain trade or cause Plaintiffs to suffer

antitrust injury. Indeed, apart from complying with the NCAA eligibility rules, there is not a single factual allegation in the Complaint about the Licensing Defendants agreeing with each other or anyone else to fix prices, refuse to do business with student athletes, exclude student athletes from any market, or otherwise restrain competition in any way. Plaintiffs' broad and generic references to "multimedia licensing agreements" between Licensing Defendants and NCAA member schools cannot sustain an antitrust lawsuit as a matter of law. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007) (conclusory allegations of an agreement does not supply facts adequate to show illegality).

The mere fact that one party licenses rights made available from another party cannot make it a Sherman Act violator. If that were true, every licensee and licensor would face the risk of antitrust liability based on legal, procompetitive conduct. Nor can a plaintiff bring an antitrust claim merely because a defendant supposedly chose to do business with someone else. As the Supreme Court has long recognized, *all* contracts "restrain" trade in some sense, by binding a buyer and seller to certain terms, but the Sherman Act has not been interpreted to proscribe all such arrangements. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *accord Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence.")

As a leading treatise explains: "[V]ertical agreements between actual or would-be suppliers and customers are everywhere . . . . Their very ubiquity indicates that only a few will be of antitrust concern." 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1437, at 3 (2013); *id.* ("[T]he ordinary sales contract fixes the transaction price[;] … it does not restrain trade."). Thus, the mere allegation that Licensing Defendants licensed certain unspecified rights from certain third parties, and not

others, who made those rights available does not support antitrust liability. *E.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (a market participant "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently"); *accord United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The Licensing Defendants are not alleged to have entered into any agreement to "exclude" student athletes from any market or to "fix" their compensation at zero. Furthermore, even if the Licensing Defendants paid student athletes to use their NIL for some hypothetical purpose, those payments would immediately cause the athletes to lose their amateur status and disqualify them from playing, thereby making any promise of payment both illusory and pointless. Thus, any claim by Plaintiffs that they were not paid for their participation or appearance in games necessarily circles back to the legality of the NCAA's amateurism and eligibility rules. As much as Plaintiffs may desire to run away from the allegations in the Complaint, practically they cannot do so because the reason Plaintiffs have not and cannot be paid (the "prices are fixed at zero") are the NCAA amateurism rules that lie at the heart of their defective antitrust claims. But Plaintiffs have now unequivocally abandoned their attack on those amateurism rules. For these reasons, and because the Supreme Court has conclusively resolved the key antitrust issue in Plaintiffs' Complaint, holding that the NCAA's amateurism rules do not violate the Sherman Act, Plaintiffs' antitrust claims must fail.

CONCLUSION

It is now more evident than ever that neither in the Complaint, nor in their opposition papers, can Plaintiffs identify any cognizable restraint attributable to any of the Licensing Defendants. Accordingly, Plaintiffs' claims against the Licensing Defendants should be dismissed with prejudice.

Dated: March 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 6, 2015, I caused the foregoing Reply Memorandum of Law In Support of Licensing Defendants' Motion To Dismiss the Complaint to be electronically filed via the Court's CM/ECF System. Counsel for all parties will be served via the Court's CM/ECF system at the email addresses on file.

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